

ISSUES

"Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor."

The prevailing factor for the Claimant's present need for surgery is the act of picking up a 50 pound case of fruit on March 29, 2012, and twisting. She heard and felt a pop in her back and now has pain in both legs.

Dr. Camden Whitaker is authorized as the Claimant's treating physician, including his recommended surgery. All medical is ordered paid.

Temporary total disability payments are ordered paid beginning April 1, 2013, and continuing until the Claimant is released.¹

Respondent appeals and asserts claimant, at most, aggravated a preexisting condition of degenerative arthritis. Respondent next contends that claimant failed to prove that her March 29, 2012, work accident or repetitive work activities were the prevailing factor causing her back injury and need for medical treatment and, therefore, claimant's personal injury, whether by accident or repetitive trauma, did not arise out of and in the course of her employment with respondent.

Claimant contends the Board lacks jurisdiction to consider respondent's appeal because respondent admitted claimant met with personal injury and that claimant sustained a work-related back injury on March 29, 2012. If the Board determines it has jurisdiction to hear this appeal, claimant asks the Board to affirm ALJ Clark's Order.

The issues before the Board are:

1. Does the Board have jurisdiction to review this matter?
2. If so, did claimant's injury by accident arise out of and in the course of her employment with respondent? Specifically: (a) did claimant merely aggravate a preexisting medical condition and (b) was claimant's accident the prevailing factor causing her injury and need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In her Application for Hearing, claimant alleged that she sustained a low back injury on March 29, 2012, when she lifted a case of fruit. Claimant testified she heard and felt a pop in her back while turning to place the case of fruit on a cart. Claimant felt immediate

¹ ALJ Order at 1.

pain in her low back. According to claimant, she was treated by Drs. Mark Dobyns, Barrett, and Meister and evaluated by Drs. Camden Whitaker and Pedro A. Murati. Claimant testified that prior to March 29, 2012, she had no symptoms of back pain that caused her to seek medical treatment.

At the request of respondent, claimant was evaluated by Dr. Whitaker on February 18, 2013. Claimant gave a history of injuring her low back when she lifted a case of fruit. Dr. Whitaker physically examined claimant and reviewed x-rays, claimant's MRI report and actual MRI. His diagnosis was that claimant had "lumbar stenosis and spondylolisthesis from 3 to 5."² It was Dr. Whitaker's opinion that claimant's twisting injury at work aggravated her preexisting degenerative condition. Dr. Whitaker testified claimant's accident was one factor in claimant's low back injury and need for medical treatment. He also testified that claimant's age, weight, body mass index, stenosis, spondylolithesis and lumbar spondylosis with facet joint arthrosis were all factors in claimant's back injury and need for medical treatment. Dr. Whitaker opined that the prevailing factor causing claimant's back injury was a combination of her underlying degenerative condition and her twisting injury at work. He testified:

You can't have one without the other. You know, how long would she have been asymptomatic with her degenerative condition if she hadn't had this twisting injury, I don't know. Would she have these problems if she didn't have the degenerative condition and just had the twisting injury, probably not. I mean it is very difficult to separate those two things.³

Dr. Whitaker indicated claimant had asymptomatic nerve compression before her accident that was caused by her degenerative condition. He explained that one must think of the nerves being inside a tube that has already narrowed from the degenerative condition and for some reason claimant's twisting injury caused the tube to become symptomatic. Dr. Whitaker testified that it was impossible to distinguish between the event at work and the degenerative condition as the prevailing factor causing claimant's injury.

At the request of her attorney, claimant was evaluated by Dr. Murati on November 19, 2012. His impressions were low back pain with signs of radiculopathy and left SI joint dysfunction. Dr. Murati's report indicates a May 4, 2012, x-ray revealed mild to moderate lumbar spondylosis with mild degenerative listhesis at L3-4 and L4-5 and sclerosis of the SI joints bilaterally, raising the possibility of mild sacroiliitis. In the section of his report concerning prevailing factor, Dr. Murati indicated claimant had no preexisting injuries that would be related to her current diagnoses. He then went on to opine that under all reasonable medical certainty and probability the prevailing factor in the development of claimant's back condition was her work accident.

² Whitaker Depo. at 6.

³ *Id.* at 10-11.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. Under K.S.A. 2011 Supp. 44-534a(a)(2) a contention that the ALJ has erred in finding claimant sustained a personal injury arising out of and in the course of his or her employment is an argument the Board has jurisdiction to consider. Respondent asserts that claimant's back injury by accident did not arise out of and in the course of her employment with respondent because claimant merely aggravated a preexisting medical condition and her accident was not the prevailing factor causing her injury and need for medical treatment. Under K.S.A. 2011 Supp. 44-534a(a)(2), those are issues over which the Board has jurisdiction on an appeal from a preliminary hearing Order.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁵

K.S.A. 2011 Supp. 44-508 states in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

⁴ K.S.A. 2011 Supp. 44-501b(c).

⁵ K.S.A. 2011 Supp. 44-508(h).

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Respondent first asserts that claimant aggravated her preexisting degenerative back condition and, therefore, pursuant to K.S.A. 2011 Supp. 44-508(f)(2), claimant's back injury is not compensable. K.S.A. 2011 Supp. 44-508(f)(2) provides that an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. Prior to her March 29, 2012, accident, claimant had never received medical treatment for back pain, but Dr. Whitaker indicated claimant had a preexisting degenerative back condition. An MRI and x-rays verified that claimant had preexisting lumbar stenosis and spondylolisthesis. Dr. Whitaker opined claimant's work-related accident aggravated her preexisting degenerative back condition. He explained in detail that claimant's work accident resulted in claimant's asymptomatic preexisting degenerative back condition becoming symptomatic. Dr. Murati indicated a May 4, 2012, x-ray revealed mild to moderate lumbar spondylosis with mild degenerative listhesis at L3-4 and L4-5 and sclerosis of the SI joints bilaterally, but then found claimant had no preexisting injuries that are related to claimant's current diagnoses. This Board Member finds claimant's March 29, 2012, accident aggravated a preexisting degenerative condition.

Respondent also asserts claimant did not prove her work accident or repetitive work activities were the prevailing factor causing her back injury. Claimant, however, did not assert nor did she present evidence that she sustained a back injury by repetitive trauma. Therefore, this Board Member will address only whether the back injury claimant sustained **by accident** arose out of and in the course of her employment with respondent.

Dr. Murati opined claimant's accident was the prevailing factor causing her back injury and need for medical treatment. He arrives at that conclusion by ruling out claimant's smoking habit, hobbies or preexisting degenerative back condition as a cause for her back injuries. Dr. Whitaker was acutely aware of claimant's preexisting degenerative back condition. He testified that it was impossible to distinguish between the event at work and the degenerative condition as the prevailing factor causing claimant's injury. Again, this Board Member finds Dr. Whitaker's opinion on prevailing factor to be more credible than that of Dr. Murati.

Accordingly, this Board Member finds claimant's back injury is not compensable because her accident was the triggering event that aggravated her preexisting degenerative condition and rendered it symptomatic. This Board Member also finds claimant failed to prove her accident arose out of and in the course of her employment as her accident was not the prevailing factor causing her back injury and need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, the undersigned Board Member reverses the April 25, 2013, preliminary hearing Order entered by ALJ Clark.

IT IS SO ORDERED.

Dated this ____ day of July, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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John D. Clark, Administrative Law Judge

⁶ K.S.A. 2012 Supp. 44-534a.

⁷ K.S.A. 2012 Supp. 44-555c(k).